No. 11,889

IN THE

United States Court of Appeals

For the Ninth Circuit

C. T. POTTER, ET AL.,
Appellants,

vs.

KAISER COMPANY, INC., a corporation, and UNITED STATES OF AMERICA,
Appellees.

Brief of Appellee, Kaiser Company, Inc.

GORDON JOHNSON,
RICHARD DEVERS,
J. WARREN MANUEL,
Attorneys for Appellee, Kaiser Company, Inc.

THELEN, MARRIN, JOHNSON & BRIDGES,
111 Sutter Street,
San Francisco, Calif.

HART, SPENCER, MCCULLOCH & ROCKWOOD,
Yeon Building,
Portland, Oregon.
Of Counsel.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

Subject Index

Table of Authorities Cited

STATUTES

No. 11,889

IN THE

United States Court of Appeals

For the Ninth Circuit

C. T. POTTER, ET AL.,
Appellants,

vs.

KAISER COMPANY, INC., a corporation, and UNITED STATES OF AMERICA,
Appellees.

Brief of Appellee, Kaiser Company, Inc.

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the District of Oregon dismissing an action brought under the Fair Labor Standards Act of 1938, as amended. The dismissal was for want of jurisdiction, by reason of the provisions of Section 2(d) of the Portal-to-Portal Act of 1947.*

The jurisdiction of this Court to hear the appeal exists by virtue of Title 28, United States Code, section 1291 (Public Law 773, 80th Congress, Second Session).

*Herein at times referred to as "the Act."

II.

STATEMENT OF THE CASE

(A) The Pleadings.

The pleadings in the case, so far as pertinent to the issues raised on this appeal, are fairly stated by Appellants in their Opening Brief, in the first portion of their statement of the case, at pages 2 to 5.

(B) The Evidence.

Appellants' summary of the evidence, as set forth at pages 5 and 6, is sketchy and, quite naturally, overlooks the evidence favorable to the appellee on the basis of which the trial court granted the motion to dismiss under the Portal-to-Portal Act of 1947.

1. THE NATURE OF THE CLAIMS.

The evidence establishes that the appellant guards are seeking to recover overtime and liquidated damages under the Fair Labor Standards Act for time spent in attending roll call, inspection, assignment to posts, issuance of instructions, and marching to their posts. Appellant Potter testified,

> "We had to be there a half hour *before we went on duty*"* (Tr., p. 58).

It is to be noted that this witness broke down the claimed half hour by further testifying that the roll call, inspection, post assignment and issuance of instructions took about ten minutes, the remainder of the half hour being consumed by the guards in walking from the guardhouse to their posts of duty in the shipyard (Tr., p. 59).

---

*Emphasis is ours, unless otherwise noted.

2. THE WINDFALL CHARACTER OF THE CLAIMS.

While the amended complaint of the Appellants makes claim for the described activities in the period between February 1, 1942, and May 1, 1946 (Tr., p. 5), at the trial Appellants' counsel conceded that no claims existed after March 3, 1945 (Tr., pp. 86-87). Thus, this appeal involves claims for overtime covering a period in excess of three years, from February 1, 1942, to March 3, 1945.

It is admitted that Appellants were paid their wages week by week; that they accepted and cashed their checks; that since they were being paid at hourly rates they knew how many hours they were being paid for; and that they knew that Appellee, in computing their time, was not including any time in advance of their arrival at their posts of duty in the shipyard (Tr., pp. 76-78).

Notwithstanding this knowledge on the part of Appellants, they concede that the first demand made by them on Appellee was not made until this action was instituted on January 17, 1946 (see Tr., p. 50), more than ten months after the expiration of the period covered by the claims and almost four years after the commencement of the claim period (Tr., pp. 78-79). (This statement is subject to the qualification that the claims were the subject of a discussion between counsel for the parties three or four months before the action was commenced, see Tr., p. 79.)

Appellant Potter, who is the assignee of all the other Appellants (Tr., p. 79), started taking assignments of the claims some time after his employment terminated on March 4, 1945 (Tr., p. 80). Commencing in December, 1944, he had heard rumblings in the guard department that payment should be made for reporting time (Tr., p.

80), but he did not bother to pursue the matter until around June or July, 1945, when he consulted with the Wage and Hour Division of the Department of Labor and was told that, on the basis of certain court decisions, the guards had claims against Appellee (Tr., pp. 84-85). It was then that Potter and his friends decided they should get together and file a lawsuit, whereupon he commenced taking the assignments (Tr., pp. 85-86).

All of this evidence is highly pertinent on the issue as to whether the amounts sought to be recovered by this appeal are "windfall payments, including liquidated damages, of sums for activities performed by them (Appellants) without any expectation of reward beyond that included in their agreed rates of pay" as referred to in Section 1(a)(4) of the Portal-to-Portal Act.

3. THE NON-EXISTENCE OF A CONTRACT, CUSTOM OR PRACTICE MAKING THE ACTIVITIES COMPENSABLE.

With respect to the requirements of Section 2 of the Portal-to-Portal Act concerning the existence of an express provision of a contract between Appellants and Appellee, or a custom or practice, making compensable the activities covered by the claims, the record establishes beyond the remotest doubt that there was no such contractual provision, no such custom and no such practice.

The testimony of Appellant Potter (which by stipulation was adopted as the testimony of the other Appellants on the issue as to the application of the Portal-to-Portal Act; see Tr., pp. 89-90) leaves no doubt on these subjects. He testified that he had no written contract; that Appellee never told him he would be paid for time spent in reporting prior to going on his shift; that in the period involved

Appellee never to his knowledge paid any guard for time in advance of going to his post of duty; that so far as he knew, Appellee never had in effect at the shipyard where Appellants were employed any custom or practice under which reporting time was paid for; and that he had no written or non-written contract under the terms of which such time was to be considered in computing wages (Tr., pp. 82-83). Furthermore, there is no collective bargaining agreement involved (Tr., p. 87).

The testimony on these points is ably summarized in the following concession by counsel for Appellants:

> "Mr. Landye: No. *We will say that there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for.*
>
> Mr. Johnson: *I take it, too,* from your statement, since you say none of them were paid at any time, *that there was no custom or practice at the Swan Island Yard under which the time was compensable?*
>
> Mr. Landye: *Unless I can take custom and practice retroactively.* After March 3, 1945, they discontinued the practice" (Tr., pp. 87-88).

(C) The Findings and Conclusions.

Appellants dispose of the Findings of Fact and Conclusions of Law by quoting a portion of one finding from which they apparently derive satisfaction, and very casually mentioning the remainder.

They fail to note that in Finding 4 the court found that there was no contract under which the activities sued on were compensable, the only contract being that Appellants would be compensated for the time spent by them in actually guarding the shipyard (as distinguished from

the activities sued on) and that said contract had been fully performed and Appellants fully paid thereunder; and that in Finding 5 the trial court found that there was no practice, custom or usage at the shipyard involved under which guards were compensated for time spent before or after the performance of their principal activity of guarding the shipyard, the fact being that in computing time worked by guards, allowance was made only for time spent at posts of duty while guarding the shipyard, as distinguished from time spent in reporting, preparation for duty, roll call, assignment to post, receipt of instructions and going to or from posts of duty (Tr., pp. 39-41). Conclusions 2 and 3 are of like effect (Tr., pp. 41-42).

It was by reason of the evidence outlined above, summarized in the foregoing findings and conclusions, that the trial court determined that the activities sued on were not compensable under Section 2(a) or Section 2(b) of the Portal-to-Portal Act and that, consequently, under the provisions of Section 2(d) of the Act jurisdiction was lacking (Tr., p. 42). The judgment of dismissal was therefore entered "for want of jurisdiction" (Tr., pp. 43-44).

(D) The Questions Involved on the Appeal.

As Appellants correctly state, the two issues raised by the appeal are: (1) whether Section 2 of the Portal-to-Portal Act is applicable to the present case; and, if so, (2) whether as so applied the Act is constitutional.

III.

ARGUMENT

A. Section 2 of the Portal-to-Portal Act of 1947 Is Applicable to the Facts of This Case.

1. SECTION 2 OF THE ACT MAKES ALL CLAIMS UNDER THE FAIR LABOR STANDARDS ACT IN EXISTENCE ON THE ENACTMENT OF THE ACT UNENFORCEABLE UNLESS SUCH CLAIMS ARE MADE COMPENSABLE BY AN EXPRESS PROVISION OF A CONTRACT OR BY A CUSTOM OR PRACTICE.

By its plain and unequivocal language, Section 2 of the Portal-to-Portal Act prohibits the enforcement of any overtime claims under the Fair Labor Standards Act which came into existence prior to May 14, 1947 (the date of enactment of the Portal-to-Portal Act), unless such claims involve activities which were compensable by either (1) "an express provision of a written or nonwritten contract" or (2) "a custom or practice." Thus, Section 2 provides:

> "Relief from Certain Existing Claims Under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.
>
> (a) *No employer shall be subject to any liability* or punishment *under the Fair Labor Standards Act of 1938,* as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), *on account of the failure of such employer* to pay an employee minimum wages, or *to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—*
>
> (1) *an express provision of a written or nonwritten contract* in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) *a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed,* covering such activity, not inconsistent with a writtten or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) *For the purposes of subsection (a) an activity shall be considered as compensable* under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*

(c) *In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938,* as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, *in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.*

(d) *No court of the United States,* of any State, Territory, or possession of the United States, or of the District of Columbia, *shall have jurisdiction of any action or proceeding,* whether instituted prior to or on or after the date of the enactment of this Act, *to enforce liability* or impose punishment *for or on account of the failure of the employer to pay* minimum wages or *overtime compensation under the Fair Labor Standards Act of 1938,* as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, *to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.''*

Notwithstanding the simple and plain provision of the Act that an employer shall not be liable for an existing overtime claim *unless the activity giving rise to the claim was compensable by contract, custom or practice,* Appellants undertake (at pages 15 to 22 of their Opening Brief) the task of rewriting Section 2 so as to limit and qualify its provisions and their application. They first argue that "the sole reason for passage of the Portal-to-Portal Act" (Appellants' Opening Brief, p. 15) was the Supreme Court's decision in the *Mt. Clemens* case, 328 U.S. 260; and they then assert, on the basis of references to the Congressional Record, that such was the intent of Congress. Thus, they conclude that while the Act is applicable to a case where an employee "is suffered or permitted to work when not *required** to do so" (Appellants' Opening Brief, p. 21), "it is crystal clear that Congress did not intend to apply the Act to situations such as those involved in this case" (Appellants' Opening Brief, p. 21) in which the employees were required to perform the activities sued on.

In making this argument, Appellants either overlook or fail to understand the legislative history of the Portal-to-Portal Act. As originally enacted by the House, the Act (H.R. 2157) dealt with both existing claims and future claims in one section. When H.R. 2157 reached the Senate, it was amended so as to treat existing claims in one section and future claims in another section. The Conference Committee of the Senate and the House then prepared a substitute bill which incorporated the Senate's division of existing and future claims into two separate

*Appellants' emphasis.

sections (see Bureau of National Affairs: The Portal-to-Portal Act of 1947, pp. 3-5).

When Section 2, dealing with existing claims, and Section 4, dealing with future claims, are compared, it will be noted that there is a radical difference between the two sections. Section 4, with respect to future claims, contains a prohibition against the enforcement of limited types of claims, that is, (1) walking, riding or traveling to and from the actual place of performance of the principal activity and (2) activities preliminary or postliminary to the principal activity. These activities are those commonly known as portal-to-portal activities and of the character involved in the *Mt. Clemens* case.

On the other hand, Section 2 contains no such limitation on the activities to which it is applicable. It says that an employer shall not be liable "for or on account of *any* activity * * * except an activity which was compensable by either * * *" an express provision of a contract, or a custom or practice.

Consequently, if we were concerned in this case with Section 4, the argument of Appellants might be applicable; but we are here concerned with Section 2, and Appellants' argument is therefore unsound because it fails to recognize the historical legislative fact that the Act as finally enacted applies entirely different rules to existing claims than to future claims. With respect to future claims, the prohibition against enforcement applies to limited types of activity; with respect to existing claims, the prohibition against enforcement applies to *any* activity unless it is compensable by an express contract provision or by a custom or practice.

The very quotation from the Senate debate which Appellants quote at pages 19 and 20 of their Opening Brief demonstrates that the confusion into which they have been drawn by reason of their failure to distinguish between Section 2 and Section 4 existed also on the floor of the Senate. In the quotation, Senator Pepper commented on a situation in which women were told to come to their place of employment half an hour early for the purpose of getting ready to work. Senator Baldwin replied that there was no question but that such time would be compensated for. However, Appellants have inadvertently failed to complete the quotation, for immediately following that portion set forth in their brief, the following discussion occurred:

> "Mr. Pepper. Let us see whether the Senator from Connecticut or the Senator from Florida has a point. *I am assuming that the Senator from Connecticut knows that under the terms of the committee bill the cases referred to on page 48 are compensable only in the future, and not in the past.* Does the Senator recognize that?
>
> Mr. Baldwin. *I did not so understand.*
>
> Mr. Pepper. That is where the able Senator was in error. *If the committee had laid down the same principle as to existing claims, it would have been a far-reaching step.*"

This additional portion of the debate not only negatives Appellants' argument as to what the understanding of the Senate was, but demonstrates the confusion that results if one fails to distinguish between the broad prohibition on the enforcement of existing claims contained in

Section 2 and the narrower limitation on future claims contained in Section 4.

That the application of the Act is not limited to the factual situations involved in the *Mt. Clemens* case is emphasized by the case of *Kemp v. Day & Zimmerman Incorporated* (June 15, 1948), 15 Labor Cases, ¶64,588, in which the Iowa Supreme Court said (15 Labor Cases, page 73,842):

> "The short title or designation of 'Portal-to-Portal Act' is not significant, but it is significant that many of the decisions refer to it as the 'so-called' Portal-to-Portal Act. The *Mt. Clemens* case was perhaps the final and impelling force in bringing about the passage of the Act, but the holdings in *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 [9 Labor Cases ¶51,197], and *D. A. Schulte, Inc. v. Gangi,* 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114, 167 A.L.R. 208 [11 Labor Cases ¶51,230], preventing amicable settlements between employer and employee, avoiding a release in full, and an accord and satisfaction of a good faith dispute, and the decision in *Overnight Transportation Co. v. Missel,* 126 F.(2d) 98 [5 Labor Cases ¶60,854] (4 Cir. 1942), affirmed in 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 [5 Labor Cases ¶51,145], that the liquidated damages provision was mandatory regardless of the good faith of the employer or the reasonableness of his attitude, had their part in the inclusion of remedial provisions in the Portal-to-Portal Act.
>
> The reach of the Act extends beyond activities of the *Mt. Clemens* case type. As said in *Seese v. Bethlehem Steel Co.,* 74 F.Supp. 412, 416 [13 Labor Cases ¶64,061], *supra:* 'It will be noted that the Act in this respect is not limited to portal-to-portal activities, as such, but defines the essential character-

istics of any alleged liability for nonpayment of minimum wages or overtime compensation. *None* are to be compensable "except an activity which was compensable by either—" contract, custom or practice. Furthermore, while the language includes the word "except," it seems entirely clear from the whole wording that the *exception is the only activity which is compensable.'* "

And in *Bateman v. Ford Motor Co., supra,* 14 Labor Cases ¶64,353 (D. C. E. D. Mich. S. Div. 2/27/48), after quoting Sections 2 (a) (1) (2), [it was] said:

> 'These provisions applied to any employer liabilities, whether based on activities prior to or after the Act's enactment, making the act admittedly retroactive, *and furthermore, applying with equal force to claims which under previous decisions might have been considered meritorious as well as to fantastic "windfalls"* sought by the great majority of these so-called Portal-to-Portal suits.' (Italics supplied.)"

Similarly, in *Boerkoel v. Hayes Mfg. Corp.* (W.D. Mich., S.D. March 26, 1948) 14 Labor Cases, Para. 64,415, p. 73,126, it was held:

> "Plaintiff contends that Section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. *However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee's day.* It should be noted that Section 4 of the Act deals only with future claims

for so-called portal-to-portal activities. In determining that Section 2 of the Act is not limited to strictly portal-to-portal activities, the court said in *Seese v. Bethlehem Steel Co., supra* (74 F. Supp. 416 [13 Labor Cases ¶64,061]):

> 'When we look at the wording and structure of the Portal Act we find that it was clearly intended to define what activities claimed to create a liability for overtime work were made compensable. Thus the language reads—(see Section 2 (a) hereinbefore quoted). * * * It will be noted that the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for nonpayment of minimum wages or overtime compensation. None are to be compensable "except an activity which was compensable by either—" contract, custom or practice. Furthermore, while the language includes the word "except," it seems entirely clear from the whole wording that the exception is the only activity which is compensable.' "

Thus, the legislative history with respect to the Act disproves the argument of Appellants that Congress intended to limit the application of the Act, so far as existing claims were concerned, to situations such as were presented in the *Mt. Clemens* case. The action of Congress in distinguishing between existing and future claims and dealing with the two subjects in separate and materially different sections conclusively demonstrates (if anything other than the plain language of the sections were required to do so) that *Congress intended to bar all existing claims except those involving an activity which was*

compensable either by express provision of a contract or by custom or practice. The artificial line of demarcation which Appellants seek to draw within the field of existing claims is not supported by the language of the Act or by its history.

Neither is this artificial line of Appellants supported by the decisions since the enactment of the Portal-to-Portal Act. There have been two decisions involving the enforceability of claims for activities almost identical with those sued on here, and in both cases the provisions of Section 2 were held to bar the enforcement of the claims.

The first of these cases is *Battery Workers' Union v. Electrical Storage Battery Co.* (E.D. Pa., January 30, 1948) 14 Labor Cases, Para. 64,298, where company guards arrived twenty to thirty minutes before the start of their shift. During the period prior to the time their shift started they changed into uniforms, picked up equipment, reported to the captain's office to receive instructions and went to their posts. The court stated at page 72,712:

> "The mere fact that a guard was at the defendant's plant or on the premises, after punching in, for more than 40 hours in any week (or in terms of a 5 day week, more than 8 hours per day) does not entitle him to overtime pay. Under the Fair Labor Standards Act, overtime for which claim is made must be devoted to work. *Moreover, since the Portal-to-Portal Act of 1947, regardless of the fact that the activities may constitute work under the Fair Labor Standards Act, the employer is required to pay overtime for only such of them as were compensable by either express contract or by custom or practice.*

In the present case the plaintiff's claim for overtime as to each guard is made up by aggregating three different kinds of activities: (1) 'On guard' duties—standing at a fixed post or making rounds through the plant—(2) changing into and out of uniform, (3) reporting to the captain's office to pick up equipment and receive instructions, walking to and from the post, turning in equipment and waiting in the locker room to punch out at the end of the shift.

As to (1), there can be no question that the time spent on posts and on rounds is work within the Fair Labor Standards Act and is chargeable to the employer under the Portal-to-Portal Act.

As to (2), one of the issues submitted to the jury for its special verdict was, 'Were the guards engaged in work when they were changing into and out of uniform?' The jury answered 'No.' * * * But even if, in spite of the special verdict, changing into and out of uniform should be held to be work under the Fair Labor Standards Act, the employer would be relieved of liability to pay for it by the Portal-to-Portal Act. There is no evidence that it was an activity which was ever compensable either by contract or by custom. The plaintiff contends that the union contract makes it compensable, but the provisions relied upon are merely general overtime provisions and in no way attempt to define the nature of the work for which overtime will be paid. The Act does not merely require that the contract provide for payment of overtime pay but that it must expressly provide that the activities in question be compensable.

I hold that the retroactive provisions of the Portal-to-Portal Act apply to the facts of the present case and that the Act as so applied is constitutional.

> As to (3), assuming that these activities constitute work under the decision of the Supreme Court in the *Mt. Clemens* case, they also are noncompensable by the Portal-to-Portal Act."

The other case is *McLaughlin v. Todd & Brown, Inc.* (N.D. Ind., S.B. Div., April 7, 1948) 15 Labor Cases, Para. 64,606. In that case company firemen were required to assemble at the plant before starting their shift. This assembly period was fixed at thirty minutes prior to the time the shift started and during this period of time the firemen changed into their fire-fighting uniforms, put their fire-fighting equipment, such as helmets and boots, on the fire trucks, stood roll call and went to their posts of duty.

The plaintiffs contended the roll call time *was required* and was therefore part of their "principal activity." The court held that the claim for the time spent during these roll call periods was not compensable since such claims were barred by Section 2 of the Act, stating at page 73,894:

> "The plaintiffs contend that they were required to appear on the employer's premises and start their 'essential' duties before the beginning of the period for which they were paid. Rather than being a preliminary activity, they say that their 'show up' time was actually a part of their principal activity and that, therefore, Section 2 of the Portal-to-Portal Act does not apply. In support of this view, the plaintiffs maintain that this section must be interpreted in light of Section 1 of the Act, which contains a statement of policy and findings revealing the purpose of Congress at the time of its enactment; further, the

plaintiffs contend that it was the purpose of Congress to nullify the effect of judicial interpretation of the Fair Labor Standards Act of 1938 'in disregard of long established customs, practices and contracts been employers and employees,' which specifically, plaintiffs say, meant preliminary and postliminary activities that theretofore never had been regarded as compensatory and which became so only after the decisions in *Tennessee Coal, I., & R. R. Co. v. Muscoda Local,* 321 U.S. 590 [8 Labor Cases ¶51,175]; *Jewell Ridge Coal Corp. v. Local 6167,* 325 U.S. 161 [9 Labor Cases ¶51,201], and *Anderson et al. v. Mt. Clemens Pottery Co.,* 328 U.S. 680 [11 Labor Cases ¶51,233].

Section 2 of the Act provides that unless an activity was compensable by either a written or oral contract or by a custom or practice in effect at the time the activity was performed, the employer is not liable to compensate for such activity under the Fair Labor Standards Act of 1938, as amended. *There is nothing ambiguous about the provision. Its meaning is explicit and plain.* And where a statute is plain and unambiguous, there is no room for construction. *U. S. v. Wiltberger,* 18 U.S. 76 (1820); *Cutten v. Wallace,* 80 F.(2d) 140 (1935).

There is no evidence that the activities covered by the 'showup' time in question were made compensable either by an express provision of a written or oral contract or by a custom or practice covering such activity. This being the fact, it must be concluded that the Portal-to-Portal Act bars recovery, unless, as the plaintiffs contend, Section 2 of the Act is unconstitutional.

However, if one adopts the plaintiffs' contention that Section 2 of the Act must be interpreted in the

context of the statute as a whole, and with particular reference to the statement of policy contained in Section 1, there is nothing which would change the foregoing conclusion.''

It is submitted that the language of Section 2, the legislative history of the Act, and the interpretation placed on it by the courts compel the rejection of Appellants' effort to limit the application of Section 2 and require affirmance of the action of the trial court in dismissing this case for want of jurisdiction, by reason of the provisions of the Act.

2. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS CANNOT BE DISTORTED SO AS TO MAKE NON-COMPENSABLE ACTIVITIES COMPENSABLE.

Appellants next argue that the Act is not applicable to the present case for the reason that if the activities sued on were not preliminary or postliminary they were compensable under the contract of employment, which, so they say, ''admittedly provided compensation for all activities not of a 'preliminary' or 'postliminary' nature * * *'' (Appellants' Opening Brief, p. 23). They further state that the court found, in effect, ''that the company promised to pay for all of the principal activities of the guards.'' (Appellants' Opening Brief, p. 25).

In making these arguments, Appellants seek to twist and distort the distinction which the trial court made between the principal activity of guarding the shipyard and the activities sued on, which the trial court termed preliminary or postliminary to said principal activity. Thus, in Finding 3 the Court found that the claimed

hours of overtime related "to activities which were preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard." (Tr. pp. 39-40). In Finding 4 the trial court found that there was no contract, written or unwritten, making compensable activities preliminary or postliminary to Appellants' "principal activity, to-wit, guarding said shipyard" but that the only contract with Appellants was that they would be compensated for the time spent by them in actually guarding said shipyard, as distinguished from any preliminary or postliminary activities in connection therewith (Tr., p. 40). Finding 5, dealing with the custom or practice at the shipyard, is similar, reciting that the practice, custom and usage at the shipyard in computing time worked by guards was to allow only the time actually spent by the guards "at their posts of duty and while guarding said shipyard." (Tr., pp. 40-41).

It is abundantly clear that by its findings and conclusions the trial court drew a line of distinction between the time spent by Appellants at their posts of duty while actually guarding the shipyard, as distinguished from the time spent by them in reporting, preparing for duty, attending roll call, receiving assignments and instructions, and going to or from their posts of duty. The trial court held that the contract with the Appellants, and Appellee's custom and practice, was to pay only for the time spent by the guards at their posts of duty and while actually guarding the shipyard, as distinguished from the activities sued on and described in the preceding sentence hereof. Nowhere in the findings or the conclusions (or elsewhere

in the record, for that matter) is there any admission that the contract "provided compensation for all activities not of a 'preliminary' or 'postliminary' nature." Nor do the findings of the court have the effect of holding that Appellee promised to pay for any activities, however they may be called, other than actual guarding of the shipyard by the guards while at their posts of duty. To contend otherwise is to attempt to import into the record something which is not there.

Appellants argue, of course, that the court misapplied the words "preliminary" and "postliminary" for the reason that in fact the activities sued on were "principal" activities. They again attempt to build up an argument out of the provisions of Section 4 of the Act which, as already noted, have nothing to do with this case. The ultimate fact is that the trial court applied the proper section of the Act to the case and considered whether, within the meaning of Section 2, the activities sued on were compensable by express contract provision or by custom or practice. It found in the negative with respect to contract, custom and practice. It found that by contract, custom and practice only the time spent by the guards at their posts of duty in actually guarding the shipyard was compensable and that the activities sued on, irrespective of whether they be characterized as preliminary, postliminary, or otherwise, were not compensable.

The court could have reached no other conclusion in the light of the testimony that there was no contract, custom or practice making the involved activities compensable (Tr., pp. 82-83), and the concession of Appellants' counsel

that there was no contract (written or unwritten) and no custom or practice under which the activities sued on were compensable (Tr., pp. 87-88). In the face of this testimony and this concession, the effort of Appellants to distort the trial court's findings and conclusions by an argument that the activities sued on were compensable under the contract is beyond understanding.

Appellants attempt to support their argument by a strange mixture of ingredients. They first refer to Section 4 of the Act, dealing with *future* rather than *existing* claims, and to Congressional reports and debates with respect to future claims. They then refer to administrative interpretations of the Wage and Hour Division dealing with Section 4, and to court decisions on the compensability of guards' reporting time, which decisions were rendered before the enactment of the Act.

However, when all is said and done, their argument at this point fails because, in final analysis, they are attempting to say that the activities sued on were compensable under the contract, but the evidence discloses no such contract as they contend for, their counsel conceded "that there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for" (Tr., p. 87), and the trial court in its findings and conclusions determined that there was no such contract.

3. THE EMPLOYMENT OF APPELLANTS AT HOURLY RATES DID NOT MAKE THE ACTIVITIES SUED ON COMPENSABLE.

The third argument advanced by Appellants in support of their general proposition that the Portal-to-Portal Act is inapplicable to the present case is that since the employ-

ment was on the basis of hourly rates, with time and one half for overtime, the employment contract requires compensation for the activities sued on (Appellants' Opening Brief, pp. 32-36).

In support of this argument, Appellants refer to two decisions issued since the enactment of the Portal-to-Portal Act, one by Judge Yankwich of the Southern California District, and one by Judge Igoe of the Northern Illinois District:

Devine v. Joshua Hendy Corporation (S.D. Cal., April 30, 1948) 77 Fed. Supp. 893;

Frank v. Wilson & Co., Inc. (N.D. Ill., Jan. 30, 1948) 14 Labor Cases, Para 64,296.

It is to be borne in mind, however, that in both of those cases written collective bargaining contracts were involved, and the courts were therefore concerned in those cases with the application of the provisions of such contracts. In the present case, on the other hand, apart from the concession of Appellants' counsel that "there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for" (Tr., p. 87) there is no evidence of any such contract as was involved in the cited cases.

Here the question is as to how the time worked was computed, and the evidence establishes, as the trial court found in Findings 4 and 5, that the computation was made by allowing for and counting only the time actually spent by the guards at their posts of duty while guarding the shipyard. This being the contract, the custom and the

practice, Appellants cannot enlarge thereon by referring to the cited cases involving other factual situations.

4. ASSUMING AN IMPLIED CONTRACT TO PAY FOR THE ACTIVITIES SUED ON, THE PORTAL-TO-PORTAL ACT IS NEVERTHELESS APPLICABLE.

The final argument advanced by Appellants in support of the inapplicability of the Portal-to-Portal Act is that there was an implied contract to pay for the activities sued on.

While this argument, again, is apparently contrary to the position taken by Appellants' counsel at the trial that he could prove no contract under which the time sued on was to be compensated for, the complete answer to the argument (if the record supported the claimed implied contract, which it does not) is contained in the provisions of Section 2 of the Act, that an existing overtime claim for any activity is not enforceable unless it was compensable by either "an *express* provision of a written or non-written contract" or a "custom or practice."

We submit that when Congress used the word "express" it meant what it said and intended that a contractual provision sufficient to make an activity compensable had to be directly or expressly stated, as distinguished from being implied. After all, one of the basic distinctions in contract law is that between an express provision and an implied provision; and Congress must be credited with at least a school boy's knowledge of English and of law.

This argument of the Appellants not only runs directly contrary to the unambiguous language of Section 2, but also contrary to the decisions interpreting the section.

See

Kemp v. Day & Zimmerman Incorporated, supra;
Battery Workers Union v. Electrical Storage Battery Co., supra; and
McLaughlin v. Todd & Brown, Inc., supra.

5. CONCLUSION WITH RESPECT TO THE APPLICATION OF SECTION 2 OF THE ACT TO THE PRESENT CASE.

The claims for overtime involved in this case arose in the period from February 1, 1942, to March 3, 1945. This action was commenced on January 17, 1946. Thus, the claims were in existence and this action was pending when the Portal-to-Portal Act was enacted on May 14, 1947. Consequently, Section 2 of the Act relating to *existing* claims for overtime under the Fair Labor Standards Act is applicable to the present case.

Furthermore, the record abundantly establishes that the claims here involved constitute "windfall" claims. Appellants were paid from week to week and knew, throughout the entire period of more than 3 years covered by the claims, that they were not being compensated for the activities and the time sued on. The testimony of the representative appellant, Potter, establishes that it was not until December, 1944, that the Appellants first conceived the idea that they had claims against the Appellee on which they now sue and that up to that date, covering the bulk of the period involved, they had no "expectation of reward beyond that included in their agreed rates of pay." Therefore, the claims fall within the Congressional findings stated in Section 1 of the Act.

Since the claims existed on the enactment of the Act

and are for overtime compensation under the Fair Labor Standards Act, Section 2(a) prohibits their enforcement unless they relate to an activity which was compensable by either "an express provision of a written or non-written contract" or "a custom or a practice." The testimony establishes, and counsel for Appellants conceded, that there was no such contract and no such custom or practice.

In addition, the provisions of Section 2(b) and Section 2(c) of the Act must be considered. Section 2(b) provides that an activity shall be considered compensable under a contract custom or practice "only when it was engaged in *during the portion of the day with respect to which it was so made compensable.*" The record in this case shows that Appellee never paid any guard employed by it for the time in advance of his going to his post of duty and actually guarding the shipyard; and there is no evidence that it ever agreed to do so.

Section 2(c) provides that in determining the time for which an employer employed an employee "there shall be counted all that time, *but only that time,* during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section." The only compensable time established by the record is the time during which the guards actually guarded the shipyard at their posts of duty, and, accordingly, that is the only time that can be counted under Section 2(c).

It is submitted that by their evidence and their concessions, Appellants themselves have affirmatively shown that their claims are unenforceable under Section 2 of the

Act and that, therefore, under subsection (d) the court was without jurisdiction. Despite all of their arguments to the contrary, in final analysis Appellants' claims are contrary to the direct, plain and unambiguous language of Section 2, and that Section constitutes an insurmountable obstacle to the enforcement of the claims sued on in this action.

B. Section 2 of the Portal-to-Portal Act Is Constitutional as Applied to the Facts of This Case.

Appellants assert that Section 2 of the Act, as applied to the present case, is unconstitutional for various reasons.

The United States, as an intervenor, has filed a comprehensive brief on the constitutional issues. We shall not burden the Court with a repetition of the arguments presented by the Government in support of the constitutionality of the Act. We desire only to point out that the Act has uniformly been held to be constitutional, as is indicated by the decision of the Court of Appeals for the Second Circuit in *Battaglia, et al. v. General Motors Corporation* (July 8, 1948), 15 Labor Cases, Para. 64,619, and the decision of the Court of Appeals for the Sixth Circuit in *Fish v. General Motors Corporation* (August 2, 1948), 15 Labor Cases, Para. 64,674.

On the basis of these two decisions, together with the arguments presented and the decisions cited in the Government's brief, it is submitted that the Portal-to-Portal Act, as applied to the present case, is constitutional.

CONCLUSION

On the basis of the foregoing considerations, it is respectfully submitted that the trial court's judgment of dismissal for want of jurisdiction should be affirmed.

The claims involved in this case existed on the enactment of the Portal-to-Portal Act of 1947 and are therefore subject to Section 2 of the Act. In these circumstances, the claims are unenforceable in the absence of a showing that the activities sued on were compensable either by an express contract provision or by a custom or practice. The evidence not only fails to disclose such an express contractual provision or custom or practice but it was conceded by Appellant's counsel that such contract, custom and practice did not exist and could not be proved. Such being the record, the trial court was clearly without jurisdiction, by reason of the provisions of Section 2(d) of the Act, and had no alternative but to order dismissal.

The attack on the constitutionality of the Act is not well-founded and therefore the order of dismissal should stand affirmed.

Respectfully submitted,

GORDON JOHNSON,
RICHARD DEVERS,
J. WARREN MANUEL,
Attorneys for Appellee,
Kaiser Company, Inc.

THELEN, MARRIN, JOHNSON & BRIDGES,
HART, SPENCER, MCCULLOCH & ROCKWOOD,
Of Counsel.